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Yew Mun Khean v Kumpulan Liziz Sdn Bhd

B HIGH COURT (IPOH) — CIVIL SUIT NO AA-22NCVC-88–06 OF 2016
HAYATUL AKMAL JC
25 MARCH 2018

C *Labour Law — Constructive dismissal — Orders of secondment to other office by employer not complied with by employee — Whether orders valid and lawful — Whether employee furnished sound reasons as to non-compliance — Whether employee/claimant came to court with clean hands — Whether claimant/employee constructively dismissed by employer*

D The plaintiff ('SP3') was the financial controller of the defendant with a monthly salary of RM16,500. Due to the tight financial position of the company, the defendant's salary was reduced from RM16,500 to RM8,250 with a proviso that the salary would be reinstated once the financial position of
E the defendant had improved. SP3 objected against the salary reduction and the defendant sent a letter confirming the pay reduction exercise for the month January and February 2015 and, in the same letter, transferred SP3 to the office in Gua Musang, Kelantan. SP3 replied that he was unable to take up the proposed secondment and refused to comply with the said instruction. The
F defendant then issued SP3 another letter for his secondment to Terengganu and, again, SP3 stated that he was unable to take up the proposed secondment and refused to comply with the said instruction. The defendant demanded from SP3, an explanation as to his refusal to comply with the instructions and a domestic inquiry against SP3 was convened. The said domestic inquiry was
G satisfied that SP3 was guilty of the charged filed against him but recommended not to take any action against him. The defendant then instructed SP3 to report for duty twice but in defiance, he still failed to do so. SP3 was dismissed by the defendant. Hence the present claim by SP3 against the defendant for constructive dismissal. The defendant counterclaimed for breach of contract of
H employment.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim:

I (1) When a party comes to court, he has to ensure that his hand is not tainted. The plaintiff's hand was not clean due to the misconduct in his employment with the defendant. SP3 had willfully disobeyed the lawful and reasonable orders to be seconded to Gua Musang and Kuala Terengganu, in defiance of this doctrine. Similarly, he had also defied three written notices to report back for work. The defendant's orders

seconding SP3 were lawful and reasonable. There was no evidence of bad faith in the said orders. It was certainly not for the employee to question such orders as the law provides a separate forum to address any grievances as regard to such orders (see para 38).

(2) A contract of employment could not remain static over a period. Some element of change is inevitable. Both parties must mutually agree to any variation. But if SP3 refused to accept the order to be seconded to Gua Musang and Kuala Terengganu respectively, this did not mean that he could exercise a power of veto over the said order if the employer justified the order. As an employee he was to comply with the lawful orders but was allowed to address grievances at a separate forum. The employer retained an equal right lawfully to terminate the contract (see para 39).

(3) SP3 had not been able to adduce any shred of material of probative value that would show elements of mala fide and/or unreasonableness in the actions of the defendant in seconding him to the defendant's offices in Kelantan and Terengganu temporarily in order to set up the internal financial control system to which, as the Group Financial Controller, he was more appropriate to undertake. The court was unable to accept SP3's arguments that he could do it remotely from Ipoh and via mobile communication alone. It was not his prerogative to decide such things. His reasoning was unreasonable of the standard expected of a person in such a senior position (see para 39).

(4) There was no reason to hold that SP3 had been constructively dismissed. He had voluntarily left the employment of the defendant. He elected not to exercise his right to report back for duty and then address his grievances with the defendant. There was no evidence that the defendant had directly dismissed him and/or caused him to be constructively dismissed. The plaintiff failed to prove its case against the defendant (see para 44).

[Bahasa Malaysia summary

Plaintif ('SP3') adalah pengawal kewangan defendan dengan gaji bulanan sebanyak RM16,500. Kerana kedudukan kewangan syarikat yang merosit, gaji defendan dikurangkan dari RM16,500 kepada RM8,250 dengan syarat gaji ini akan dikembalikan semula apabila kedudukan kewangan defendan bertambah baik. SP3 membantah pengurangan gaji dan defendan menghantar surat mengesahkan pelaksanaan pengurangan gaji untuk bulan Januari dan Februari 2015 dan, dalam surat yang sama, memindahkan SP3 ke pejabat di Gua Musang, Kelantan. SP3 membalas bahawa dia tidak dapat menerima peminjaman yang dicadangkan dan enggan mematuhi arahan tersebut. Defendan kemudian mengeluarkan SP3 surat lain untuk peminjamannya ke Terengganu dan, sekali lagi, SP3 menyatakan bahwa dia tidak dapat menerima peminjaman yang dicadangkan dan menolak untuk mematuhi arahan

tersebut. Defendan menuntut penjelasan daripada SP3 tentang penolakannya untuk mematuhi arahan dan satu inkuiri domestik diadakan terhadap SP3. Inkuiri domestik ini berpuas hati bahawa SP3 bersalah atas dakwaan yang difailkan terhadapnya tetapi mencadangkan agar tiada tindakan diambil terhadapnya. Defendan kemudian mengarahkan SP3 untuk melapor diri sebanyak dua kali tetapi sebagai menentang, dia masih gagal melakukannya. SP3 diberhentikan kerja oleh defendan. Oleh itu, tuntutan ini oleh SP3 terhadap defendan bagi pemecatan konstruktif. Defendan defendan menuntut balas bagi pemecahan kontrak pekerjaan.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Apabila seorang pihak hadir ke mahkamah, dia harus memastikan bahawa tangannya bersih. Tangan plaintif tidak bersih kerana salah laku dalam pekerjaannya dengan defendan. SP3 secara tidak sengaja tidak mematuhi perintah yang sah dan munasabah untuk dipinjamkan ke Gua Musang dan Kuala Terengganu, satu salah laku doktrin ini. Dia juga membantah tiga notis bertulis untuk melaporkan semula diri untuk kerja. Perintah defendan meminjamkan SP3 adalah sah dan munasabah. Tidak ada bukti niat jahat terhadap perintah tersebut. Pekerja pastinya tidak bleh mempersoalkan perintah sedemikian kerana undang-undang memperuntukkan forum berasingan untuk menangani apa-apa rungutan berkaitan perintah tersebut (lihat perenggan 38).

(2) Kontrak pekerjaan tidak boleh kekal statik dalam tempoh tertentu. Beberapa elemen perubahan tidak dapat dielakkan. Kedua-dua pihak mesti saling bersetuju dengan sebarang perubahan. Sekiranya SP3 enggan menerima perintah untuk dipinjamkan ke Gua Musang dan Kuala Terengganu, ini tidak bermakna dia boleh menjalankan kuasa veto terhadap perintah tersebut jika majikan mewajarkan perintah tersebut. Sebagai seorang pekerja, dia harus mematuhi perintah yang sah tetapi dibenarkan untuk menyuarakan rungutannya dalam forum yang berasingan. Majikan mempunyai hak yang sama yang untuk menamatkan kontrak (lihat perenggan 39).

(3) SP3 tidak dapat menimbulkan apa-apa cebisan nilai probatif yang menunjukkan unsur-unsur niat jahat dan/atau tidak munasabah dalam tindakan defendan memanggilnya ke pejabat defendan di Kelantan dan Terengganu buat sementara untuk mewujudkan sistem kawalan kewangan dalaman yang, sebagai Pengawal Kewangan Kumpulan, sesuai untuk dia jalankan. Mahkamah tidak dapat menerima hujah SP3 bahawa dia boleh melakukannya dari Ipoh dan melalui komunikasi mudah alih sahaja. Bukan prerogatifnya untuk memutuskan perkara-perkara sedemikian. Alasannya tidak masuk akal berdasarkan standard yang

diharapkan dari seseorang dalam kedudukan yang lebih tinggi (lihat perenggan 39).

(4) Tidak ada sebab untuk memutuskan SP3 dipecat secara konstruktif. Dia berhenti bekerja dengan defendan secara sukarela. Dia memilih untuk tidak melaksanakan haknya untuk melaporkan diri untuk bertugas dan kemudian menyuarakan ketidakpuasanhatinya dengan defendan. Tidak ada bukti bahawa defendan telah, secara langsung, memecatnya dan/atau menyebabkan dia dipecat secara konstruktif. Plaintif gagal membuktikan kesnya terhadap defendan (lihat perenggan 44).]

Notes

For cases on constructive dismissal in general, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1057–1058.

Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599, CA (refd)
Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd, Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) and Motor Assemblers Supervisory Staff Union, Peninsular Malaysia [1985] 1 ILR 489 (refd)
Bayer (M) Sdn Bhd v Anwar bin Abd Rahim [1995] MLJU 558; [1996] 2 CLJ 49, HC (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Bowater Containers Ltd v McCormack [1980] IRLR 50 (refd)
Grix v Munford Ltd (unreported) (refd)
Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors [2004] 3 MLJ 339, CA (refd)
MTDC Technology Media Sdn Bhd & Anor v Loke Wai Yue [2007] 1 ILR 200 (refd)
Mayban Assurance Bhd v Ujang lbrahim [2012] 4 ILR 579 (refd)
Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 5 MLJ 113, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)
Rashtriya Girni Kamgar Sangh v Khandesh Spinning And Weaving Mills Company [1951] ICR 604, HC (refd)
Soon Seng Cement Products Sdn Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employees' Union & Anor [1996] 1 ILR 414 (refd)
Suresh Kumar Karpayah v Golden Screen Cinemas Sdn Bhd [2013] 4 ILR 174, IC (refd)
Top Glove Sdn Bhd v Suppaiyah Krishnan & Anor [2006] 3 ILR 1990 (refd)
Wallace v United Grain Growers Ltd (1998) 152 DLR (4th) 1, SC (refd)
Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, CA (refd)

A *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ Rep 298; [1988] 1 CLJ 45, SC (refd)
Woods v WM Car Services (Peterborough) Ltd [1982] IRLR 413, CA (refd)

Legislation referred to

B Companies Act 1965
Industrial Relations Act 1967 s 20

Mahathir Abdullah (Athi Seelan Mahathir & Partners) for the plaintiff.
Norazali Nordin (Danial Rahman bin Yang Razali with him) (Maxwell Kenion
C *Cowdy & Jones) for the defendant.*

Hayatul Akmal JC:

INTRODUCTION

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[1] The subject matter of this civil suit revolves on the issue pertaining to loss of salary and bonuses with an alternative prayer for purported wrongful termination or constructive dismissal of the plaintiff in the employment of the defendant.

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[2] Briefly, the plaintiff filed a writ of summons (encl 1) and statement of claim (encl 2) against the defendant as follows:

(a) the sum of RM750,750 in respect of loss of monthly salary of RM10,500 per month from 15 January 2016–31 December 2021;

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(b) the sum of RM210,000 in respect of loss of annual minimum cash bonus of RM35,000 from 2016–2021;

(c) alternatively to prayer (a) above, damages for wrongful termination or constructive dismissal of the plaintiff, to be assessed;

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(d) damages for loss of reputation to be assessed;

(e) damages for mental anguish to be assessed;

H (f) exemplary damages;

(g) aggravated damages; and

(h) interest and cost

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[3] Upon the full hearing of the matter which was held on 16–17 January 2017, 2–3 March 2017, 27–29 March 2017, 10–12 July 2017 (vacated), 9–10 October 2017 and 7 November 2017 respectively, with the list of witnesses as follows:

(a) the plaintiff (SP3) had called three witnesses Ms Leong Chee Mun (SP1), account executive (ex-account supervisor of the defendant), Mr Au Kok Wah (SP2), account assistant (ex-account assistant of the defendant) and Encik Ghazali Abdul Halim (SP4) (chairman/shareholder of the defendant); and

(b) the defendant had called two witnesses, Ms Chin Set Fui (SD1), human resource officer with the defendant and Mr Liew Ah Kau (SD2), managing director of the defendant.

[4] The evidence from the parties have been duly recorded and upon perusing all the evidence presented, relevant cause papers and the respective written submissions by the counsels, on 29 December 2017, I find the plaintiff had on balance of probabilities failed to prove his case and I accordingly dismissed his claim against the defendant. For the counterclaim, I find the defendant had on balance of probabilities proved its case against the plaintiff and I allowed the said counter claim with damages to be accessed by the senior assistant registrar. Dissatisfied with the above decisions, the plaintiff is now appealing against both decisions.

BRIEF FACTS

Parties have filed their agreed facts and it was marked as 'D'. In preparing these brief facts, I have also perused the evidence and the exhibits that I have before me. Briefly the facts are as follows:

[5] The plaintiff (SP3) is a Malaysian citizen who was an employed officer of the defendant and had commenced his employment on 16 March 1995 as a finance manager with a monthly salary of RM4,500. From 1 January 2014 he held the position as the financial controller with a monthly salary of RM16,500. The main responsibility of the plaintiff was to handle all financial and finance related issues of the defendant (refer para 4, 'D').

[6] The defendant is a private limited company duly registered under the Companies Act 1965 and is part of a group of companies known as Liziz Group of Companies which includes Liziz Plantation Sdn Bhd and Sykt Pembinaan Aiong Sdn Bhd. There are three shareholders of the defendant, ie Mr Liew Ah Kau ('SD2') who is also the managing director of the defendant, Encik Ghazali Abdul Halim ('SP4') who is an executive director and also the chairman of the defendant and Mr Liew Ah Yong ('LAY') who is a shareholder and also the younger brother of SD2 (not called as a witness). According to SP4, each shareholder holds equal shares of 33% of the shares in the company, but however, there is a trust agreement in place where SP4 is holding certain number of shares for SD2 upon trust. Officially SP4 holds 70% shares, SD2 holds 20% and LAY holds 10%. In 2013 (an event occurred which I will

elaborate below), LAY sold his shares to SP4 and SD2. After the said sale, SP4 still holds 70% share (subject to the trust agreement mentioned earlier) but SD2 had increased his holding to a 30% stake in the company.

[7] SP3 in his evidence confirmed that he has always reported directly to SD2 and this was affirmed by the evidence of SP4 and SD2. SP3 claimed that sometime in 2013, a dispute arose between the shareholders (allegedly involving the misappropriation of funds by SD2 amounting to RM20m). With SP3 acting as an intermediary, the dispute was then settled by the signing of a 'Deed of Compromise and Mutual Exchange of Shares' dated 14 August 2013 (exh P5) for a consideration of RM20m. SP3 claimed that as he was able to settle the shareholders dispute, the company in return issued him a letter of assurance of continuous employment whereby on 28 August 2013, SP4 signed the said letter of assurance of continuous employment of SP3 for the defendant (exh P7). It is to be mentioned at this juncture that this letter was drafted and prepared by SP3, without first referring to the human resource department of the defendant. According to SP4, SP3 met him with exh P7 asking him to sign and according to SP4, he signed the letter in good faith that everything was in order.

[8] Approximately sixteen months later the defendant however, based on the alleged tight financial position of the company had on 29 December 2014, through SP4 issued SP3 a letter dated 29 December 2014 (exh P8) whereby the defendant reduced SP3's salary from RM16,500 to RM8,250 with a proviso that the salary will be reinstated once the financial position of the defendant had improved. On 20 January 2015, SP3 via a letter (exh P10), among others, objected to the salary reduction and argued that since the letter carries the letter head of Sykt Pembinaan Aiyong (group company) and not the defendant, therefore the said letter was not an official letter from the defendant.

[9] The defendant subsequently however, had via a letter dated 21 March 2015 (exh P14) confirmed the pay reduction exercise for the months of January and February 2015 and in the same letter transferred SP3 to the office in Gua Musang, Kelantan as Finance Manager/Financial Controller. SP3 then wrote SP4 a letter dated 31 March 2015 (exh P15) confirming the discussion SP3 had with SD2 where SP3 took the option to stay put in Ipoh head office with an agreed salary reduction. A letter dated 14 April 2015 which SP3 referred as 'Varied Terms of Employment' was duly signed by SP3, SP4 and SD2 (exh P17) stating the terms of employment as agreed by the parties.

[10] However on 28 May 2015, the defendant issued SP3 a letter dated 28 May 2015 (exh P18) asserting that the defendant's proposal for the restructured employment (exh P17) was not workable and impractical. In the circumstances the defendant proposed to revert to the former terms and

conditions of employment with effect from 1 June 2015. SP3 via his letter dated 1 June 2015 (exh P19) rejected the defendant's suggestion and stated his wish to maintain the terms as agreed earlier on 14 April 2015 (exh 17). A

[11] The defendant then issued SP3 a letter dated 20 June 2015 (exh P20) for his secondment to Gua Musang, Kelantan for a few months to help set up a suitable financial system of internal controls for the company's plantation and mill operations. However, by a letter dated 26 June 2015 (exh P21), SP3 issued a letter stating that he was unable to take up the proposed secondment and refused to comply with the said instruction by the defendant. B C

[12] The defendant then issued SP3 a letter dated 14 September 2015 (exh P22) for his secondment to Terengganu for a few months to set up a suitable financial system of internal controls for the company's operations. SP3 however, by a letter dated 30 September 2015 (exh P23), issued a letter stating that he was unable to take up the proposed secondment and again refused to comply with the said instruction by the defendant. D

[13] Consequently, the defendant then issued a letter dated 6 October 2015 (exh P24) demanding SP3 to explain his refusal to comply with the instructions given by the defendant via their letters dated 20 June 2015 (exh P20) and 14 September 2015 (exh P22). In his written reply, dated 8 October 2015 (exh P25), SP3 denied violating any of the terms and conditions of his employment and instead relied on the varied terms of employment (exh 17). E F

[14] The defendant followed up with the issuance for a notice for domestic inquiry against SP3 dated 15 October 2015 (exh P26) for failure to comply with the transfer order and secondment orders and other charges filed against SP3 where he was suspended from his post pending the determination of the domestic inquiry proceeding. In his defence, SP3 via his letter dated 9 November 2015 (exh P27) referred to his letter dated 26 June 2015 (exh P21) and 30 September 2015 (exh P23), denied any violation of the varied terms of employment. On 9 November 2015 additional charges was filed against SP3 (exh P31). The domestic inquiry was held on 9 November 2015 and 7 December 2015, where the domestic inquiry tribunal was satisfied that SP3 was found guilty of all the charges filed against him but however, the said tribunal recommended not to take any action against SP3 where he was instead instructed via a letter dated 7 January 2016 (exh P37) to report for duty on 11 January 2016. G H I

[15] SP3 however, via his letter dated 11 January 2016 (exh P36) to the defendant, sought the defendant's confirmation of his varied terms of employment. The defendant then issued a further letter dated 12 January 2016

(exh P40) instructing SP3 to report for duty on 14 January 2016 but in defiance, he still failed to do so. This causes the defendant to issue a final reminder dated 15 January 2016 (exh D57) instructing SP3 to report for duty but again in defiance SP3 failed to do so.

[16] SP1 and SP2 in their evidence confirmed that sometime in October 2015, SD2 called for a staff meeting and they were notified during this meeting that SP3 no longer works for the defendant. SP1 and SP2 confirmed that SP3 was dismissed by the defendant.

[17] SD1 is the human resource officer of the defendant and confirmed that the meeting that was held on 16 October 2015 was to inform the staff that SP3 employment has been suspended and during cross examination, she disagreed when it was put to her that SP3 was actually dismissed from the defendant.

[18] SD2 is the managing director of the defendant and in his evidence maintained that the defendant had never dismissed or constructively dismissed SP3 and alleged that SP3 was the one who unilaterally in breach walked out of his employment. Even though the defendant's domestic inquiry tribunal found SP3 to be guilty of misconduct at the conclusion of the proceeding, the defendant elected not to dismiss SP3 from his employment. As a matter of fact the defendant had issued several notices to SP3 directing him to return to work, but all was blatantly ignored by him. Therefore as a result of his action breaching his employment, the defendant counter claimed the loss of services suffered by the defendant from SP3 as prayed in paras 5–10 of its counterclaim.

ISSUES TO BE TRIED

Parties have filed the issues to be tried and marked as 'E'. The issues are as follows:

(a) whether the defendant had terminated the employment or cause the constructive dismissal of the plaintiff's employment or whether the plaintiff had walked out of his employment; and

(b) if the defendant had wrongfully terminated the plaintiff's employment, whether the plaintiff has suffered loss and damages as stated in para 41 of his statement of claim.

THE PLAINTIFF'S SUBMISSIONS

[19] Learned counsel for the plaintiff argued that the crux of SP3's claim against the defendant is based on the express terms of the varied terms of employment (exh 17), which effectively varied the terms of SP3's employment, in that, for a substantial reduction in SP3's salary of more than 36%, from

RM16,500 to only RM10,500, an assurance of employment from 2015–2021 was given and SP3's scope of duties limited to liaising with bankers, advising management on commercial and legal disputes and advising the company and the group on business and corporate matters (cl 3), additional 90 days leave, SP3 has the flexibility of his own time management, sole discretion on venue of work and can be contactable during official working hours.

[20] I was alluded to the case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 where Federal Court held that:

> [42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix fanning the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract ...

Learned counsel further argued that the court should not be concerned with introducing terms to exh P17 to make it fairer or more reasonable but should only be concern with what the relevant words in exh P17 connotes.

[21] It was submitted that the cumulative meaning of the provisions in exh P17 are as follows:

(a) cl 4 provides SP3 sole discretion over his venue of work place in that it was mandatory for the defendant to recognise that SP3 is the only person who could determine the venue of his work place. Learned counsel submitted that the terms are reasonable in that:

  (i) SP3 has given up more than 36% of his salary for the rights accorded to him under exh P17;

  (ii) it was within the knowledge of both parties that it was of fundamental importance that SP3 remain in Ipoh, Perak to care for his ailing mother;

  (iii) in any event, SP3 would remain contactable via his mobile phone during official working hours; and

  (iv) SP3 is given the flexibility of own time management and his venue of work place which means SP3 flexibility in determining where he worked from, and his working hours, which again, was entirely reasonable as SP3 would remain contactable via handphone during official hours;

(b) cl 6 provides that it is irrevocable, which bears the indisputable meaning that the terms of exh P17 could not be reversed or cancelled; and

(c) cl 7 provides that except for the above terms, all other terms and conditions of employment of SP3 shall remain unchanged. In other words, learned counsel argued, this means the terms and conditions of employment of SP3 has been expressly changed by the content of exh P17.

[22] Learned counsel submitted that, from the facts of this case, it is apparent that the defendant is guilty of breaching exh P17 which goes to its foundation that the defendant has evinced an intention to be no longer bound by exh P17 and the 'critical events' that occurred support the plaintiff's contention or can be construed as SP3 been constructively dismissed from his employment by the defendant in bad faith and that the defendant had unlawfully terminated his employment. Briefly the critical events are as follows:

(a) the misappropriation of funds (RM20m) by SD2 and the subsequent letter issued for the 'Assurance of Continuous Employment';

(b) the unilateral reduction of SP3's salary (exhs P8 and P14);

(c) the varied terms of employment of SP3 (exh P17) with no intention of honouring the same;

(d) the attempted unilateral secondment of SP3 to Gua Musang, Kelantan;

(e) the second attempted unilateral secondment of SP3 to Terengganu;

(f) the domestic inquiry ('DI'); and

(g) events after the DI, among others is the placing of closed circuit camera ('CCTV') in the vicinity of SP3's office, the refusal of SD2 to amend the notes of DI and eventually SP3 set out his position that he has been constructively dismissed.

THE DEFENDANT'S SUBMISSIONS

[23] Learned counsel for the defendant submitted that it is settled that 'constructive dismissal' arises when an employee terminates his contract of employment and therefore considers himself discharged from further obligations because the employer is guilty of such breach which affects the foundation of the contract or because the employer has evinced or shown an intention no longer to be bound by such contract. Common law principles are relevant to the determination of constructive dismissal. If the employee delays in terminating the contract, he may be regarded as having elected to affirm the contract and would lose the right to treat himself as discharged. Repudiatory

conduct consisting of a series of acts or incidents can give rise to a claim for constructive dismissal. A

[24] It is further argued by the said counsel that there are four conditions which have to be met by the plaintiff to be able to successfully claim for constructive dismissal as was decided in the High Court decision in *Bayer (M) Sdn Bhd v Anwar bin Abd Rahim* [1995] MLJU 558; [1996] 2 CLJ 49, ie; (i) there must be a breach of contract by the employer; (ii) the breach must be sufficiently important to justify the employee resigning; (iii) the employee must leave in response to the breach and not for any other unconnected reason; and (iv) and he must not occasion any undue delay in terminating the contract otherwise he will be deemed to have waived the breach and agreed to vary the contract. B C

[25] I was alluded to the decision of the Court of Appeal in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599, which endorses the aforementioned decision. It is the argument of the said learned counsel that the plaintiff has failed to satisfy all four conditions set out above and the fact that the plaintiff is now relying on the principles of constructive dismissal is misconceived, both in fact and in law. D E

[26] As for the issue of the salary reduction, it was argued that it had been expressly stated in the said letter that the said action was temporary in nature and once the financial position of the defendant improves, the plaintiff's full salary was to be reinstated. However this issue is no longer valid since the defendant had fully paid the shortfall of the plaintiff's salary for the months of January, February and March 2015 in the month of May 2015. Apart from the plaintiff, there was one other employee, a site manager, who was also issued a letter by the defendant to propose a reduction of salary. Therefore, learned counsel submitted that there was no singling out the plaintiff as obliquely suggested by the plaintiff. In any event when the issue of the salary deduction occurred, the plaintiff had not taken any legal recourse to address the salary deduction situation at all and it was resolved three months later. There is no valid basis to bring up this dead issue as it has been overtaken by subsequent events. It is argued that the defendant as an employer, has the prerogative and inherent/implied powers to conduct domestic inquiry against any employee, including the plaintiff for misconduct committed during the course of the employees' employment period. F G H

[27] The plaintiff was given every opportunity to defend his position during the domestic inquiry proceeding. All the required procedure were followed to ensure legitimacy of the said proceeding. For all intents and purposes SP3 was accorded the right to be heard. It was further argued that this lawful domestic inquiry proceeding cannot be made one of the subject matter for a claim for I

A constructive dismissal. It is the valid finding of the domestic inquiry tribunal that the charges levelled against the plaintiff had been proven. The company however, notwithstanding that finding by the said tribunal, elected to retain the plaintiff's employment with the defendant. The defendant had on three separate occasion (exhs P37 (7 January 2016), P40 (12 January 2016) and D57 B (15 January 2016)) issued written instruction for SP3 to report for work but in defiance it was blatantly ignored by him while SP3 on the other hand claimed that the defendant had prematurely and recklessly announced his dismissal from the defendant's employment with effect from 17 October 2015 as told to him by SP1 and SP2 who claimed they heard it being said by SD2, of which C SD2 refuted that such a statement was made at a staff meeting of the defendant as claimed.

[28] As for SP1 and SP2, it was submitted that they are not reliable witnesses D and their evidence should be rejected as both witnesses are not sure of the words purportedly uttered by SD2. Further, their answers are identical which is too much of a coincidence. The fact remains that what SP1 and SP2 testified was totally contradictory to the facts which unfolded. SP3 was not dismissed as wrongly alleged by them.

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[29] It was further submitted by learned counsel that, right at the outset, the defendant was perplexed as to the reason why the plaintiff was making such demands which finally resulted in the plaintiff's letter. The actual reason came to light during trial when it was discovered that the plaintiff had set up his own F business known as 'TCY Asset Management Services'. To be exact, the plaintiff became a partner of the said business on 9 December 2015 wherein the 'business start date' was also 9 December 2015.

G **[30]** It is further submitted that based upon exh D60 (SSM search report on the company set up by SP3), it is evident that SP3 had, at all material times, acted in bad faith and schemed to profit improperly from the defendant. The fact that the plaintiff had withdrawn his claim from the Industrial Court shows that he is not interested in reinstatement, instead, he is hoping for a higher H damages as a windfall in this court. The defendant had at all material times abided to the terms and conditions of the varied terms of employment and strongly deny that the plaintiff is entitle to claim for the reliefs prayed for. The alleged constructive dismissal by the plaintiff is done in bad faith and is wrong in fact and law as he only walked out from his job after the decision of the panel I of the domestic inquiry. The defendant had made all attempts to get the plaintiff to return and report for work but the plaintiff refused and continued to be absent from work. He also began to make unreasonable demands.

THE LAW ON CONSTRUCTIVE DISMISSAL

[31] It is settled as in *Anwar bin Abdul Rahim*, case that the prerequisite in filing a claim for constructive dismissal are as follows:

(a) there must be a breach of contract by the employer/defendant. This may either be an actual breach or anticipatory breach;

(b) that breach must be sufficiently important to justify the employee/plaintiff resigning or else it must be the last in a series of incidence, albeit an erroneous interpretation of the contract by the employer will not be capable of constituting a repudiation in law;

(c) the employee must leave in response to the breach and not for some other, unconnected reason; and

(d) the employee must not delay too long in terminating the said contract in response to the alleged breach by the employer or else he may be deemed to have waived the alleged breach.

Lord Denning MR in looking at the decision of Browne Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1982] IRLR 413 at p 415, stated:

> Just as a servant must be good and faithful, so an employer must be good and considerate. Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice.

[32] In industrial law, the employer has every right to reorganise his business in any manner for the purpose of economy or convenience provided he acts bona fide. Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer had acted or behaved unreasonably towards him. The employer's wrongful conduct must be serious, amounting to a fundamental breach of contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract any longer. The employer's conduct has to be looked at as a whole and its cumulative impact to be assessed. Only actual conduct of the employer and not the perception of that conduct by the employee can potentially support a constructive dismissal claim. In other words, the employee's subjective opinion or personal reaction to the change is irrelevant. What is relevant is whether, from an objective standpoint, the change to the employment relationship was fundamental in nature (see *Dismissal from Employment and Remedies* (2nd Ed, LexisNexis, 2014) by Ashgar Ali Ali Mohamed at pp 183 and 187). It is a legal requirement in constructive dismissal cases that the employee concerned must inform the employer of his claim of constructive dismissal or it would be fatal to the claim. The employee can then regard himself as having been dismissed and resigned from

employment without serving notice and thereafter alleging unfair dismissal.

[33] The implied obligation of mutual trust and confidence has become generally accepted and applied in the consideration and ruling on relevant disputes concerning dismissal. Therefore, whenever an employee is to be dismissed, demoted or reprimanded for his conduct, he should be fairly dealt with and given the opportunity to answer the allegation. As stated earlier, breach of the implied term of trust and confidence is regarded as a fundamental breach that goes to the root of the contract (see *Wallace v United Grain Growers Ltd* (1998) 152 DLR (4th) 1 at p 8 (SC) Can). The burden of proving constructive dismissal lies on the claimant. He has to prove on a balance of probabilities that the employer has committed the breach and as a result he left the employment. It is incumbent upon the claimant to establish the conditions constituting constructive dismissal, in that, firstly, the employer by its conduct had breached the contract of employment; secondly, that the terms which had been breached went to the foundation of the contract; thirdly, that the employee pursuant to and by reasons of the aforesaid breach had left the employment and not for some other reasons; and fourthly, that the employee left at an appropriate time soon after the breach complained of (see English Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713 (CA) Eng). In *MTDC Technology Media Sdn Bhd & Anor v Loke Wai Yue* [2007] 1 ILR 200, there was a delay of two months after an alleged repudiatory act by the company. It was held that the claimant by her inordinate delay must be taken to have waived the breach and to vary the contract. In other words, the claimant had affirmed the new terms of the contract, while in *Top Glove Sdn Bhd v Suppaiyah Krishnan & Anor* [2006] 3 ILR 1990 the claimant failed to prove that his transfer was tainted with mala fides on the part of the company. The facts instead showed that the transfer was authentic as it resulted from an urgent request by the Klang factory. There was absolutely no evidence that the company wanted or intended to ease out the claimant under the guise of exercising its management power of transfer due to his union activities. In this regard I do take cognisance of the settled position as stated in *Woods*' case Browne-Wilkinson J reprimanded such practice. His Lordship stated that:

> Any employer who wishes to get rid of an employee or alter the terms of his employment without becoming liable either to pay compensation for unfair dismissal or a redundancy payment have had to resort to methods of 'squeezing out' an employee stopping short of any major breach of the contract, such an employer attempting to make the employee's life so uncomfortable that he resigns or accepts the revised terms. Such an employer, having behaved in a totally unreasonable manner, then claims that he has not repudiated the contract and therefore that the employee has no statutory right to claim either a redundancy payment or compensation for unfair dismissal.

[34] However, I find no such evidence to support such proposition in the

present case as the facts had shown which I had tabulated for ease of reference at para (37) below. In *Suresh Kumar Karpayah v Golden Screen Cinemas Sdn Bhd* [2013] 4 ILR 174, it involves the allegation of mala fide transfer to a different branch of the company. The claim was dismissed as the claimant failed to show that the transfer from Puchong to Johor Bharu branch was mala fide and tantamount to a victimisation on the part of the company. Transfers had always been at the prerogative of the company. In *Mayban Assurance Bhd v Ujang lbrahim* [2012] 4 ILR 579, it involves a transfer order due to a restructuring exercise. The claimant had resigned on his own accord. It was held that the claimant failed to prove that the company, in exercising its management prerogative to transfer, was in breach of a fundamental term in his contract of employment or had evinced an intention not to be bound by it. The evidence adduced in fact showed that the claimant did not even bother to report for duty to the transferred position and had abandoned his employment claiming constructive dismissal.

[35] If a claimant failed to prove on a balance of probabilities that the employer was in breach of a significant or fundamental term of the contract of employment, the Industrial Court will hold that the claimant had left the company at his own will or resigned voluntarily and not that he was constructively dismissed by the company. The repudiatory conduct of the employer may consist of a series of acts or incidents. In *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9 (CA) Gopal Sri Ram JCA stated as follows:

> ... Constructive dismissal can take place ... in a number of cases. Since human ingenuity is boundless, the categories in which constructive dismissal can occur are not closed. Accordingly, a single act or a series of acts may, according to the particular and peculiar circumstances of the given case, amount to constructive dismissal.

In *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ Rep 298; [1988] 1 CLJ 45, the Industrial Court said:

> The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.

FINDINGS OF THIS COURT

[36] Before I proceed further I would briefly mentioned the issue on why the plaintiff had chosen to file his claim in the High court and not at the Industrial Court even though the latter is clothed with sufficient jurisdiction to hear this matter under s 20 of the Industrial Relations Act 1967. At the early stage of this

trial, I have posted both counsels this issue and I was then made to understand that the plaintiff is claiming for loss of salary and the claim for constructive dismissal is an alternative claim and therefore plaintiff had withdrawn their claim in the industrial court and had instead filed this claim in the High Court. Both counsels confirmed the above facts and have no objection for this court to proceed with the hearing of this matter. The plaintiff is seeking compensation for purported constructive dismissal of his employment with the defendant as set out in the statement of claim. The defendant's denial is as set out in the statement of defence.

[37] For ease of reference in examining the pertinent facts, I have tabulated the events in sequence of its chronological dates in order to determine whether the facts adduced supports the plaintiff's claim of constructive dismissal:

No	Dates	Particulars	Exhibit
1	15 March 1995	SP3 commences employment.	
2	28 August 2013	Claimed to have resolved internal shareholders dispute and was issued a letter of assurance for continuous employment fully drafted and prepared by SP3 without the intervention of the HR department.	P7
3	29 December 2014	Approximately after 16 months a letter issued by defendant to reduce the salary due to tight financial position.	P8
4	20 January 2015	SP3 via a letter objected to the salary deduction and claimed that the said letter comes from a group company (Sykt Pembinaan Aiyong) and not the defendant.	P10
5	21 March 2015	The defendant confirmed the salary deduction exercise in a letter and also ordered SP3 to report for duty at the Gua Musang, Kelantan office to set up the internal financial control system.	P14

6	31 March 2015	11 days later, SP3 wrote a letter electing to accept the salary reduction but to remain in the Ipoh Head Office. For this purpose a term sheet 'Varied Terms of Employment' (exh P17) was duly signed by the parties on 14 April 2015.	P15
7	14 April 2015	A lop sided varied terms and conditions of employment which is all in favor of SP3, drafted and prepared by SP3 with no intervention of the HR department came into existence.	P17
8	28 May 2015	The defendant however approximately 1 1/2 month later via a letter asserted that the arrangement under exh P17 was not workable as SP3 holds an important and fundamental position in the defendant as the Group Financial Controller, and wishes to revert back to the former terms and conditions.	P18
9	16 February 2015	SP3 wrote rejecting the suggestion and opted to follow the terms in exh P17.	P19
10	20 June 2015	The defendant issued a letter to second SP3 to the Gua Musang, Kelantan Office (a second time) as was instructed prior to the varied terms of employment (exh P17) for him to set up the internal financial control system in that said office.	P20
11	26 June 2015	SP3 however via a letter refused to comply with the said instruction by the defendant.	P21
12	14 September 2015	Approximately 2 1/2 months later, the defendant issued another instruction for the defendant to report for duty in the Terengganu office also to set up the internal financial control system there.	P22

13	30 September 2015	SP3 similarly defied the said instruction in writing.	P23
14	6 October 2015	SP3 was required to explain his defiance of the lawful instructions of the defendant.	P24
15	8 October 2015	SP3 wrote and denied any misconduct and continued relying on the terms sheet on variation of the terms of employment (exh P17).	P25
16	15 October 2015	The defendant issued notice to commence a domestic inquiry proceeding against SP3 for his alleged misconduct and was duly suspended from his employment.	P26
17	9 November 2015	SP3 via his letter again denied any wrong doing and continued relying on the terms sheet on variation of the terms of employment (exh P17).	P27
18	9 November 2015	On 9 November 2015 the domestic inquiry tribunal found him guilty to which SP3 did not offer an appeal. The said tribunal elected not to punish SP3 for his misconduct but instead recommended to the defendant to which the defendant did via a letter dated 7 January 2016 (exh P37) that SP3 report back for duty.	P37
19	11 January 2016	SP3 still in defiance, wrote insisting on the varied terms of employment in exh P17.	P36
20	12 January 2016	The defendant wrote instructing SP3 to report for duty but he still remained defiant and refuses to do so.	P40
21	14 January 2016	In an act of utter defiance, SP3 wrote imposing conditions for his return and in failing so claimed to have been constructively dismissed.	P45

22	15 January 2016	A final reminder was issued instructing SP3 to report for duty but defiantly he failed to do so.	D57

[38] The equitable doctrine is well settled that when a party comes to court he has to ensure that his hand are not tainted. Obviously from the facts as chronologically tabulated above the plaintiff's hand are not clean of misconduct in his employment with the defendant. In *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113 the FC stated:

(a) doctrine of superior orders applies in Malaysia;

(b) most fundamental implied duty of an employee is to obey all lawful and reasonable orders of his employers with respect to the performance of his service;

(c) the concept of an order being manifestly wrong has no part in this doctrine;

(d) it has been held that it is not for the employee to question the legality of such orders when it is given and to obey forthwith;

(e) protest about its illegality must be in a separate proceeding; and

(f) the rational would be that to allow the employee to question the legality of every order given would paralyses the management in getting work done (*Rashtriya Girni Kamgar Sangh v Khandesh Spinning And Weaving Mills Company* [1951] ICR 604).

SP3 had willfully disobeyed the lawful and reasonable three orders to be seconded to Gua Musang (twice) and Kuala Terengganu (once) in defiance of this doctrine. Similarly, he had also defied three written notices to report back for work. If he disobeys, he takes the risk, if the court finds the order to be lawful or reasonable. I find the defendant's orders seconding SP3 as mentioned above to be lawful and reasonable which is expected in any organisation with the size of the defendant's undertaking. There is no evidence of bad faith in those said orders by the defendant and certainly it is not for the employee to question such orders as the law provides a separate forum to address any grievances as regard to such orders. It is not the prerogative of SP3 at any material time to veto such orders as allowing such an action would paralyses the organisation.

[39] I find clearly, that SP3 is in breach of the superior orders doctrine and notwithstanding the lopsided variation (exh P17) solely in favor of the plaintiff. The law is settled that a contract of employment cannot remain static over a period. Some element of change is inevitable. In the strict sense of the

law both parties must mutually agree to any variation. But if SP3 refuses to accept the order to be seconded to Gua Musang and Kuala Terengganu respectively, this does not mean that he can exercise a power of veto over the said order if the employer justifies the order. As an employee he is to comply with the lawful orders but is allowed to address grievances at a separate forum. Ultimately the employer retains an equal right lawfully to terminate the contract (*Grix v Munford Ltd* case). The test is reasonableness of the order and not whether the defendant was in breach of the contract of employment (*Bowater Containers Ltd v McCormack* [1980] IRLR 50 (EAT)). Throughout the proceeding, I find that SP3 had not been able to adduce any shred of material of probative value that would show elements of mala fide and/or unreasonableness in the actions of the defendant in seconding him to the defendant's offices in Gua Musang, Kelantan and Terengganu temporarily in order to set up the internal financial control system to which as the group financial controller he is more appropriate to undertake. I am unable to accept SP3's arguments that he could do it remotely from Ipoh and via mobile communication alone. It is not his prerogative to decide such things. I find such reasoning to be unreasonable of the standard expected of a person in such a senior position.

[40] Though found guilty for insubordination after a domestic inquiry, SP3 was not punished but requested to report back for duty. However, SP3 remained defiant and refuses to comply with the order of the defendant and elected instead to walk out of his employment and claimed to be constructively dismissed. Anchored on the chronological facts as tabulated, I am not convinced on the alleged substantial breach of contract by the defendant or victimisation in the circumstances of the case. Victimisation entails an innocent workman being punished because he has in some way displeased the employer or where an employee has committed an offence but is given a punishment disproportionate to the gravity of the offence. I find no plausible evidence of victimisation in this case. The court cannot uphold a plea of victimisation in the absence of positive proof.

[41] I would like to mention also that the issue of the unilateral reduction of pay constitute a breach on the part of employer for which SP3 did not seek to enforce his right when it occurred which subsequently over a period of three months was rectified by the defendant. I find SP3 had waived his right to act on it but instead varied the terms of the employment (exh P17) which subsequently was accepted by the defendant. Being a senior member of the management (group financial controller) his presence was required in other offices of the defendant around the country to address managerial and/or financial issues arising. The part time and informal approach to his position in the defendant was realised not to be feasible and proven to be most impractical in the circumstances of the case which had led to the defendant requesting him

to go back on full time service with all the benefits (exh P18) which he had rejected.

[42] The issue of constructive dismissal in such circumstances does not arise. As mentioned earlier the law is settled in that a contract of employment cannot remain static over a period. Some element of change is inevitable to suit the predicament and/or circumstances faced by the company. When such a situation arises it is incumbent on the employee to appraise his situation and options but he certainly has no power to veto the prerogative of the company that is exercised in good faith for the benefit of the company and thereafter making a bare claim of constructive dismissal in the circumstances. It is just plainly not plausible.

[43] In the present case, the presence of SP3 was required temporarily (a few months) in the offices of the defendant in Kelantan and Terengganu. It is expected in an organisation of such a size and undertaking. It is deeply entrenched principle in industrial jurisprudence that, that is the prerogative of the employer though not absolute and untrammeled. The exercise of that prerogative must not be actuated by mala fide or unfair labor practice guised under the pretext of the best interest of the company. In *Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors* [2004] 3 MLJ 339, His Lordship Ariffin Zakaria JCA (as His Lordship then was) referred to the award in *Soon Seng Cement Products Sdn Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employees' Union & Anor* [1996] 1 ILR 414, *Assembly Services Sdn Bhd, Shah Alam/UMW Engineering Sdn Bhd, Shah Alam & UMW (M) Holdings Sdn Bhd, Shah Alam (joined as a party) and Motor Assemblers Supervisory Staff Union, Peninsular Malaysia* [1985] 1 ILR 489 where His Lordship stated:

> ... the company has the right to transfer its employees within its organisation ... But if the transfer is actuated with improper motives, it will attract the jurisdiction of the court. The power to transfer is, therefore subject to (according to *Ghaiye's Misconduct in Employment* at pp 254–255) the following the following well recognised restrictions:
>
> (a) There is nothing to the contrary in the terms of employment;
>
> (b) The management has acted bona fide and in the interest of its business;
>
> (c) The management is not actuated by any indirect motive or any kind of mala fide;
>
> (d) The transfer is not made for the purpose of harassing and victimising the workman; and
>
> (e) The transfer does not involve a change in the conditions of service.

[44] These are facts which are to be ultimately decided by court. In the

circumstances of the case, based on what that has been adduced before me, I find no reason to hold that SP3 had been constructively dismissed. As a matter of fact I hold that he had voluntarily left the employment of the defendant. He elected not to exercise his right to report back for duty and then address his grievances with the defendant. There are simply no plausible evidence on the part of defendant sufficient in law that had directly dismissed him and/or cause him to be constructively dismissed.

CONCLUSION

[45] In the circumstances, the facts adduced do not support the four conditions to bring out the conclusion for constructive dismissal and on balance of probabilities, I find the plaintiff had failed to prove its case against the defendant and therefore the plaintiff's claim is dismissed with cost. With the same observation above, the counter claim by the defendant is allowed for the breach of contract of employment by the plaintiff and a further order that damages to be assessed by the senior assistant registrar (SAR).

Plaintiff's claim dismissed and defendant's counterclaim allowed.

Reported by Afiq Mohamad Noor